IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG DIVISION

BANK OF CHARLES TOWN,

Plaintiff,

v. **Civil Action No. 3:10-CV-102**

ENCOMPASS INSURANCE, et al.

Defendants.

RESPONSE IN OPPOSITION TO THE DEFENDANT GROSSMAN'S MOTION TO DISMISS PURSUANT TO FED. R. CIV.P. 12(b)(5) AND (6)

COMES NOW the Plaintiff, by and through its counsel, Laura C. Davis, Stephen G. Skinner, and the Skinner Law Firm, and as its Response in Opposition to the Defendant Grossman's Motions to Dismiss, does state as follows:

INTRODUCTORY STATEMENT

On August 27, 2010, the Plaintiff filed its Complaint against Encompass Insurance, Encompass Indemnity Company, Michelle Grossman, and John Willson in the Circuit Court of Jefferson County, West Virginia. On October 6, 2010, Encompass Insurance Company, Encompass Indemnity Company (hereinafter the "Encompass Defendants"), and Michelle Grossman removed this case to this Court on the basis of diversity jurisdiction.

Plaintiff asserted four (4) Counts against the Encompass Defendants—only one of which was also asserted against Michelle Grossman, John Willson and the John/Jane Doe Defendants. Only three of the claims against the Encompass Defendants, for breach of contract, breach of the duty of good faith and fair dealing, and UPTA violations, can result in monetary damages.

The Plaintiff did not assert specific monetary damages in its Complaint. The Plaintiff sought undetermined compensatory damages for loss to property, for denial of coverage, and undetermined compensatory and punitive damages for the Encompass Defendants' breach of contract, first party bad faith, and UTPA violations. No monetary sum was asserted against Defendants Grossman, Willson, and the John and Jane Doe either.

For the reasons set forth in Plaintiff's Motion to Remand, the Defendants cannot meet their statutory burden of proving that the amount in controversy exceeds of $75,000, exclusive of interest and costs. 28 U.S.C. §1332(b). Thus, this Court lacks subject matter jurisdiction and the Plaintiff respectfully requests that it abstain from ruling on Defendant Grossman's Motion to Dismiss and remand the case to state court for further proceedings. In the alternative, should this Court find that federal jurisdiction exists and rule upon her Motion, the Court should deny the motion.

Defendant Grossman's motion to dismiss pursuant to W.Va. R.Civ.P. 12(b)(5) is premature. Pursuant to W.Va.R.Civ.P. 4(k), the Plaintiff has 120 days from the filing of the Complaint to perfect service on Defendant Grossman. As the Complaint was only filed on August 27, 2010, the Defendant's Rule 12(b)(5) motion must be denied as precipitous.

In addition, service on an out-of-state tortfeasor is permitted though the Secretary of State pursuant to West Virginia's long arm statute, W.Va. Code § 56-3-33(a) and W.Va.R.Civ.P. 4(d)(1)(c). Ms. Grossman came into West Virginia to adjust and/or investigate an insurance claim. She availed herself of the rights and privileges of West Virginia in carrying out her work. Ms. Grossman is personally liable for her own violations of the West Virginia UTPA. *Taylor v. Nationwide Mut. Ins. Co.,* 214 W.Va. 324, 589 S.E. 2d 55 (2003). UTPA violations sound in tort. *Wilt v. State Auto. Mut. Ins. Co.,* 203 W.Va. 165, 506 S.E.2d 608 (1998). The Secretary of State is authorized to accept service of process on individuals for causing tortious injury in West Virginia under the long-arm statute, W.Va. Code § 56-3-33(a). Accordingly, service through the

Secretary of State was proper and it cannot form the basis for dismissal of the Plaintiff's claims.

With respect to Defendant Grossman's Motion to Dismiss under Rule 12(b)(6), Plaintiff sued the Defendant for her own violations of the UTPA, as set forth in Count II. Although Michelle Grossman filed a motion to dismiss Counts I, III, and IV against her, Plaintiff intended only to sue her in Count II for her UTPA violations.

Count I—as the heading indicates—is alleged against the insurer Defendants alone. Count III for declaratory judgment concerns the insurance policy and thus, is asserted against the insurer Defendants and is not meant to be against Defendant Grossman. Count IV is for estoppel/waiver which similarly implicates the insurers alone.

Defendant Grossman has not moved to dismiss Plaintiff's claims against her in Count II for UTPA violations. Thus, the parties agree that the Defendant may be liable for such claims. Because Plaintiff has not asserted any additional claims against the Defendant, the Defendant's Motion to Dismiss Counts I, III, and IV on the basis of Fed. R. Civ.P. 12(b)(6) should be denied as moot.

WHEREFORE, because the Plaintiff has failed to prove that the amount in controversy has been met in Defendants' Notice of Removal, and this Court lacks subject matter jurisdiction, Plaintiff respectfully requests that this Court abstain from ruling upon Defendant Grossman's Motion to Dismiss. In the alternative, the Plaintiff respectfully requests that this Court deny the Defendant's Rule 12(b)(5) and (6) Motions and to award such other and further relief that the Court finds proper.

BANK OF CHARLES TOWN
By Counsel

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CERTIFICATE OF SERVICE

I, Laura C. Davis, counsel for the Plaintiff, do hereby certify that on the 29th day of October, 2010, I electronically filed the foregoing **RESPONSE IN OPPOSITION TO THE DEFENDANT GROSSMAN'S MOTION TO DISMISS PURSUANT TO FED. R. CIV.P. 12(b)(5) AND (6)** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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